U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-, INC.

DATE: JAN. 26, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT services company, seeks to employ the Beneficiary as a Quality Assurance Analyst II. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based (EB-2) immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the labor certification does not support EB-2 classification because it states minimum requirements that are less than the requirements for an advanced degree.

On appeal, the Petitioner submits additional evidence and asserts that the terms of the labor certification meet the minimum requirements for advanced degree professional classification.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is September 15, 2015. *See* 8 C.F.R. § 204.5(d).

abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE ADVANCED DEGREE CLASSIFICATION

In order to be eligible for EB-2 classification, a beneficiary must possess an advanced degree or its equivalent under 8 C.F.R. § 204.5(k)(3), and the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or its equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as a master's degree or a bachelor's degree followed by five years of progressive experience. If the labor certification allows for less than an advanced degree, the position will not qualify for EB-2 classification.

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification.[2] The required education, training, experience, and skills for the proffered position are set forth at Part H of the labor certification. In this case, Part H of the labor certification states that the offered position has the following minimum requirements:

H.4.	Education: Master's degree
H.4-B.	Major Field of Study: "See H-14 for details"
H.6.	Experience in the job offered: 12 months
H.7.	Is there an alternate field of study that is acceptable? Yes
H.7-A.	If Yes, specify the major field of study: "See H-14 for details"
H.8.	Is there an alternate combination of education and experience that is acceptable? No
H.9.	Is a foreign educational equivalent acceptable? Yes
H.10.	Is experience in an alternate occupation acceptable? Yes
H.10-A.	If Yes, number of months experience in alternate occupation required: 12
H.10-B.	Identify the job title of the acceptable alternate occupation: "See H-14 for details"
H.14.	Specific skills or other requirements: The normal minimum requirements for the offered position are as follows: Master's degree

[2] We may not ignore a term of the labor certification, nor may we impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc., v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We interpret the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834.

> in Computer Science, Computer Information Systems, Electrical or Electronics Engineering or related major that provided the skills, knowledge, and abilities required and 1 year of experience in the job offered or in a related position that provided the required skills, knowledge and abilities. Also requires demonstrable experience and proficiency with the following: 1. Functional, systems, performance, integration, regression, Black Box, database, White Box, Smoke and User Acceptance (UAT) testing. 2. At least one of the following testing tools: Quality Center, QTP, Test Director, Load Runner, Rational Clear Quest, or Rational Quality Manager. 3. At least one of the following Defect Management Tools and ERP Applications: SAP, People Soft or Oracle Applications. 4. At least one of the following web applications: IIS, ASP, .net, Java, C#, C/C+, J2EE, EJP, SOAP, JavaScript, VB, VB Script, HTML/DHTML/XML, Servlets, UNIX, Oracle, SQL Server, Unix/Linux, Spring, Hibernate, AJAX, Struts, Web Services, or JQuery. Any suitable combination of education, training or experience is acceptable. The term suitable, in this context, means substantial compatibility with stated academic level and job experience requirements and ability to perform job duties. No travel or telecommuting. Position is project-based at various unanticipated work sites within the U.S., and relocation may be required at the end of each long-term project.

The Director denied the petition, concluding that the terms of the labor certification do not support EB-2 classification, because the stated minimum requirements in section H.14 are less than an advanced degree. The relevant portion of Part H.14 states that "[a]ny suitable combination of education, training or experience is acceptable. The term suitable, in this context, means substantial compatibility with stated academic level and job experience requirements and ability to perform job duties." Specifically, the Director found that the language in H.14 altered the actual minimum requirements of the job and made "it is impossible to determine what the actual minimum job requirements are."

The phrase "any suitable combination of education, training or experience is acceptable" is known as *Kellogg* language, taken from the following holding of the Board of Alien Labor Certification Appeals (BALCA) cited by the Petitioner on appeal:

> [W]here the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

Matter of Kellogg, 94-INA-465, *6 (BALCA Feb. 2, 1998) (*en banc*). The DOL regulation at 20 C.F.R. § 656.17(h)(4)(ii) codifies BALCA's ruling.[3] We generally do not interpret the standard *Kellogg* language in section H.14 to mean that an employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification, unless the petitioner's additional language allows for requirements that fall below the minimum EB-2 requirements. In this case we must determine whether the Petitioner's additional language permits applicants to qualify for the proffered position with less than an advanced degree.

On appeal, the Petitioner contends that its inclusion of the *Kellogg* language does not alter the primary and alternate requirements of the position. However, because the Petitioner completed the entries at H.4-B, H.7-A, and H.10-B with "see H-14 for details," it is impossible to determine whether there are primary and alternate requirements for the offered job, and if so, what they are. Therefore, we disagree with the Petitioner's assertion on appeal that the primary requirement is a master's degree and one year experience in the job offered, and the alternate requirement is a master's degree and one year of experience in a related position. Rather, the Petitioner relied on H.14 to set out the "normal requirements" of the job, which are a master's degree in computer science, computer information systems, electrical or electronics engineering or related major that provided the skills, knowledge, and abilities required; and 12 months of experience in the job offered or in a related position that provided the required skills, knowledge and abilities[4] or "[a]ny suitable combination of education, training or experience" where the "term suitable, in this context, means substantial compatibility with stated academic level and job experience requirements and ability to perform job duties."

In allowing for an applicant to qualify for the offered position with a combination of education, training, or experience that shows "substantial compatibility with the stated academic level and job experience requirements," the labor certification appears to permit less than an advanced degree. Although the Petitioner argues that its addition to the *Kellogg* language exceeds the requirements of 20 C.F.R. § 656.17(h)(4) to ensure that U.S. workers are sufficiently apprised of the requirements of the offered job, it has not submitted evidence that it defined the term "substantial compatibility" or that any of its recruitment for the position during the labor certification process, including the job order; the notice of filing; and advertisements included information on what was meant by "substantial compatibility" such that we could determine the actual minimum requirements for the

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[3] 20 C.F.R. § 656.17(h)(4) states, as follows:

> (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

[4] The Beneficiary has a master of science degree in electrical engineering issued by [redacted] in [redacted] Illinois in 2011. The record demonstrates that the Beneficiary has the required 12 months of experience in related positions, and that she has the special computer-based skills required by the labor certification.

job. Thus, the record does not establish that the Petitioner sufficiently defined the minimum requirements of the job in order to establish eligibility for the request classification or that U.S. workers were sufficiently apprised of the requirements of the offered job.

The Petitioner further asserts that the language in Part H.14 does not lower the actual minimum requirements, but "simply provides clarification as to what the Petitioner will accept as a substantial equivalent – which is consistent with the precedent case law." It cites the BALCA decision in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), which held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements. However, the Petitioner's reliance on this case is misplaced. The issue here is not whether Kellogg language should have been included on the labor certification, but rather whether the additional language added to H.14 alters the minimum requirements of the offered position. Moreover, as discussed above, the additional language does not provide clarification as to what the Petitioner will accept, but instead prevents us from determining the actual minimum requirements of the offered position.

Further, on appeal, the Petitioner asserts that the Director's decision is inconsistent with "hundreds (if not thousands) of prior decisions by [USCIS]" and that the Director has not given a reason for deviating from these prior decisions. However, the Petitioner did not provide a single example of a decision interpreting a labor certification drafted similarly to the one in this case.[5] Therefore, it has not established that the Director deviated from prior decisions. Further, we are not bound by a decision of a service center or district director. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

Here, the addition of the language permitting applicants to qualify for the position with "substantial compatibility with stated academic level and job experience requirements and ability to perform job duties" allows for something less than an advanced degree. Therefore, the offered position does not meet the minimum requirement for EB-2 classification.

III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director, the record does not establish that the Petitioner has the continuing ability to pay the proffered wage from the priority date of September 15, 2015. The proffered wage is $84,906 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to provide evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports,

[5] A petitioner bears the burden of establishing eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010).

federal tax returns, or audited financial statements. *Id.* In this case, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2015 or 2016 as required by 8 C.F.R. § 204.5(g)(2).[6] Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the priority onward.

Further, USCIS records show that the Petitioner has filed over 40 other I-140 petitions since 2013. Therefore, in any future proceedings, the Petitioner must demonstrate its continuing ability to pay the combined proffered wages of the Beneficiary in this case and the beneficiaries of its other petitions that remained pending after the current petition's priority date. *See id.*; *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

IV. CONCLUSION

The labor certification does not support EB-2 classification because it states minimum requirements that are less than the requirements for an advanced degree. Further, the record does not establish that the Petitioner has the continuing ability to pay the proffered wage.

ORDER: The appeal is dismissed.

Cite as *Matter of I-, Inc.*, ID# 850604 (AAO Jan. 26, 2018)

[6] The record contains the Petitioner's federal tax return for 2014; the Beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the Petitioner in 2015, which shows that the Petitioner paid the Beneficiary less than the proffered wage that year; and several paychecks issued to the Beneficiary by the Petitioner in 2016.